

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**AMY L. BURROUGHS**

Claimant

VS.

**IBP, INC.**

Respondent,  
Self-Insured

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Docket No. 170,497

**ORDER**

Claimant and her present attorney, John J. Bryan, appealed the Order for Compensation dated February 17, 2000, entered by Administrative Law Judge Brad E. Avery. The Director appointed Jeff K. Cooper of Topeka, Kansas, to serve as Appeals Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding. The Appeals Board heard oral argument on August 30, 2000.

**APPEARANCES**

Claimant's present counsel, John J. Bryan of Topeka, Kansas, and claimant's former counsel, Diane F. Barger of Wichita, Kansas, participated in oral argument before the Appeals Board. Gregory D. Worth of Lenexa, Kansas, appeared on behalf of the respondent.

**RECORD AND STIPULATIONS**

The record consists of the transcript and attached exhibits from the February 8, 2000 hearing held before Judge Avery, the administrative file compiled in this proceeding, and Mr. Bryan's ledger sheets showing his receipt of permanent partial disability benefits in this claim.

**ISSUES**

This is a dispute over attorney fees. In January 1996, while this claim was being litigated, claimant terminated attorney Diane F. Barger and hired attorney John J. Bryan. Mr. Bryan then represented claimant to the conclusion of the initial claim.

Before the change in attorneys, claimant recovered \$21,691.82 in temporary disability benefits. After the change in attorneys, \$46,586.58 was collected in permanent partial general disability benefits. All of the disability compensation benefits that were awarded, both temporary and permanent disability benefits, have now been paid in full.

After conducting a hearing on February 8, 2000, Judge Avery determined that Ms. Barger should receive \$2,471.29 in additional attorney fees and \$1,241.43 in additional expenses. Mr. Bryan contends Judge Avery erred.

Before the Appeals Board, Mr. Bryan argued that Ms. Barger should not receive any additional fees or expenses. Mr. Bryan contends that in May 1997 Ms. Barger received a \$5,639.19 check for permanent partial general disability benefits and that Ms. Barger should have first applied the proceeds from that check to any outstanding expenses.

Conversely, Ms. Barger argued to the Appeals Board that before she stopped representing claimant she performed substantial work on the claim for permanent partial general disability benefits and that she should receive a reasonable fee for those services, plus her unpaid expenses.

The only issues before the Appeals Board on this review are whether Ms. Barger should receive an additional payment for unpaid expenses and attorney fees for the services rendered claimant in this proceeding and, if so, how much.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds:

1. Ms. Barger began representing claimant in October 1992. The contract that Ms. Barger and claimant entered into provided that Ms. Barger would receive a fee of 25 percent from the temporary and permanent disability benefits collected. The contract also provided that Ms. Barger would be reimbursed the expenses incurred representing claimant.
2. According to Ms. Barger's records, claimant received \$21,691.82 in temporary disability benefits for the period between December 2, 1992, and November 30, 1994. Ms. Barger agreed to temporarily forego taking attorney fees from most of the temporary disability benefit checks and, therefore, collected only \$1,194.44 in attorney fees and \$395 in expenses from those checks.
3. In May 1997, before the claim was decided by the administrative law judge, respondent began paying claimant permanent partial disability benefits. Although Mr. Bryan had replaced Ms. Barger as claimant's attorney in January 1996, respondent began sending claimant's permanent partial disability checks to Ms. Barger. The first permanent partial disability check, which was drawn in the sum of \$5,639.19, was negotiated by Ms.

Barger and the entire proceeds were applied to attorney fees and expenses. According to Ms. Barger's ledger, \$3,770.59 was applied to the attorney fees due from recovering the temporary disability benefits, \$1,409.80 was applied to attorney fees claimed out of the \$5,639.19 permanent partial disability benefit check, and the remaining \$458.80 was applied to outstanding out-of-pocket expenses.

4. In addition to the \$5,639.19 check, respondent sent Ms. Barger three other permanent partial disability benefit checks each drawn in the sum of \$40.52. According to Ms. Barger's records, those three checks were forwarded to Mr. Bryan.

5. After taking over as counsel, Mr. Bryan completed this claim. By Order dated February 24, 1999, the Appeals Board awarded claimant \$16,677.61 in temporary disability benefits and \$51,600.78 in permanent partial disability benefits for a total award of \$68,278.39.

6. The regular hearing in this proceeding was held in July 1995. At that time, respondent announced that it had paid 60.45 weeks of temporary disability benefits totalling \$15,306.49. And claimant announced that no additional temporary disability was being sought. In its submission letter to the Judge, respondent noted that it had paid 69.714 weeks of temporary total disability benefits totalling \$17,654.73 and three weeks of temporary partial disability benefits totalling \$438.53. There is no explanation for the discrepancy between the \$21,691.82 in temporary disability benefits collected by Ms. Barger and the \$16,677.61 in temporary disability benefits awarded.

7. Before being terminated, Ms. Barger had formulated a strategy for trying this claim and had taken several depositions for proving the extent of claimant's permanent partial general disability. Ms. Barger claims that she spent over 231 hours in representing claimant in this proceeding and has itemized \$1,241.43 in unpaid expenses. Additionally, at oral argument to the Appeals Board, Mr. Bryan and Ms. Barger represented that Ms. Barger had an additional \$125 in expenses that represented her share of the costs from the February 8, 2000 hearing.

8. Mr. Bryan also performed a significant amount of work litigating this claim. Mr. Bryan defended an interim appeal to the Appeals Board, attended two or three depositions, submitted the case to the Judge for final award, appealed the Judge's decision to the Appeals Board thereby increasing claimant's award, and defended respondent's appeal to the Court of Appeals. In short, both attorneys expended significant time and effort in this claim, which was hotly contested.

9. At oral argument before the Appeals Board, Mr. Bryan and Ms. Barger represented that it was agreed that Mr. Bryan would pay claimant 75 percent of the monies received for the permanent partial disability benefits. As a consequence, no monies were held back to pay any of the outstanding expenses. After paying his firm \$1,317.48 in fees and \$95.21

in expenses, Mr. Bryan now holds \$8,895.57 in his trust account awaiting an order for the division of fees and expenses.

10. The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.<sup>1</sup>

11. The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 1999 Supp. 44-536(b), which specifically includes:

(1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney. . .

(2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

(3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;

(4) the fee customarily charged in the locality for similar legal services;

(5) the amount of compensation involved and the results obtained;

(6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;

(7) the nature and length of the professional relationship with the employee or the employee's dependents; and

(8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he

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<sup>1</sup> K.S.A. 1999 Supp. 44-536(h).

must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.<sup>2</sup>

12. In addition to the factors listed above, the Appeals Board has considered, among other factors, the following: the proportional relationship between temporary disability and permanent partial disability benefits collected, the outcome of the claim and the appeals taken to achieve that outcome, the total litigation expenses incurred, the services that both attorneys contributed towards proving the claim for permanent partial disability benefits, the fact that monies were disbursed to claimant without withholding an amount for expenses, the total funds available for paying both fees and expenses, and the contested nature of the proceeding.

13. The Appeals Board concludes that Ms. Barger is entitled to receive her outstanding expenses along with an additional fee for the work that she performed towards advancing and proving the claim for permanent partial disability. And that additional fee should be based on quantum meruit, meaning the value of those services. Considering the work performed, the Appeals Board believes that Ms. Barger performed approximately one-third of the work and should, therefore, receive one-third of the fee associated with the permanent partial disability benefits.

14. After considering the particular circumstances of this proceeding, the Appeals Board finds and concludes that Ms. Barger should receive an additional \$2,247.67 for attorney fees and expenses. Mr. Bryan's argument that Ms. Barger should have satisfied all of her outstanding litigation expenses from the \$5,639.19 benefits check is rejected.

The Appeals Board has determined Ms. Barger's entitlement to attorney fees and expenses as follows:

(1) Because benefits were dispersed to claimant without retaining an amount for litigation expenses, the expenses must be paid from the funds that would otherwise be available for attorney fees. The maximum amount available for attorney fees and expenses (\$17,069.60) is found by multiplying the total amount awarded (\$68,278.39) by the 25 percent contingency fee that both attorneys contracted to charge.

$$\$68,278.39 \times 25\% = \$17,069.60$$

(2) Subtracting the litigation expenses incurred by both attorneys (\$2,440.44) from the total amount available for fees and expenses (\$17,069.60) leaves \$14,629.16 available for attorney fees for both the temporary disability and permanent partial disability benefits awarded.

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<sup>2</sup> *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, syl. 5, 663 P.2d 663 (1983).

$$\$17,069.60 - \$2,440.44 = \$14,629.16$$

(3) The temporary benefits awarded (\$16,677.61) represent 24.4% and the permanent partial disability benefits awarded (\$51,600.78) represent 75.6% of the total benefits awarded (\$68,278.39) in this claim.

$$\$16,677.61 \div \$68,278.39 = 24.4\%$$

$$\$51,600.78 \div \$68,278.39 = 75.6\%$$

(4) Multiplying the respective percentages for the temporary disability benefits and the permanent partial disability benefits by the net amount available for attorney fees (\$14,629.16), fees in the sum of \$3,569.52 are attributable to the temporary disability benefits awarded and fees in the sum of \$11,059.64 are attributable to the permanent partial disability benefits awarded.

$$\$14,629.16 \times 24.4\% = \$3,569.52$$

$$\$14,629.16 \times 75.6\% = \$11,059.64$$

(5) Because Ms. Barger alone performed the work necessary to obtain the temporary disability benefits, Ms. Barger is entitled to all the fee attributable to those benefits (\$3,569.52). Based upon the above findings, Ms. Barger is also entitled to one-third of the fees attributable to the permanent partial disability benefits, or \$3,686.55.

$$\$11,059.64 \div 3 = \$3,686.55$$

(6) Subtracting the monies Ms. Barger has received to date and has applied to fees and expenses (\$7,228.63) from the total of the fees and expenses that Ms. Barger is entitled to receive in this claim (\$9,476.30), leaves \$2,247.67, which represents the outstanding expenses and outstanding attorney fees to be paid from Mr. Bryan's trust account.

\$ 3,569.52	Fee for temporary benefits
3,686.55	Fee for permanent benefits
<u>2,220.23</u>	Ms. Barger's total expenses <sup>3</sup>
\$ 9,476.30	Total fees and expenses

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<sup>3</sup> This amount was determined by adding Ms. Barger's unpaid expenses (\$1,241.43) to the expenses that she collected according to her ledgers (\$853.80), plus her portion of the transcript cost (\$125) from the February 8, 2000 hearing.

\$ 9,476.30  
( 1,194.44) Fees received pre-5/97  
( 395.00) Expenses received pre-5/97  
( 5,639.19) May 1997 benefits check  
\$ 2,247.67 Net distribution to Ms. Barger

15. Based upon the unique facts presented, the Appeals Board finds that Ms. Barger should receive from the funds currently held by Mr. Bryan the total sum of \$2,247.67 for attorney fees and expenses. The remaining funds held in Mr. Bryan's trust account are awarded to Mr. Bryan in satisfaction of his claim for fees and expenses in this proceeding.

**WHEREFORE**, the Appeals Board modifies the February 17, 2000 Order for Compensation and orders Mr. Bryan to pay Ms. Barger the sum of \$2,247.67 in full and complete satisfaction of her claim for attorney fees and expenses in this proceeding.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 2000.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Topeka, KS  
Diane F. Barger, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director